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In the Supreme Court of the United States

OCTOBER TERM, 1983

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., ET AL., APPELLANTS

v.

AGRICULTURAL MARKETING AND BARGAINING BOARD, ET AL.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

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QUESTION PRESENTED

Whether certain provisions of Michigan's Agricultural Marketing and Bargaining Act are preempted by the Federal Agricultural Fair Practices Act of 1967.

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This brief is filed to elaborate upon the views of the United States submitted in response to the Court's invitation to the Solicitor General of March 16, 1983.

STATEMENT

This case is a challenge to certain provisions of Michigan's Agricultural Marketing and Bargaining Act, which are alleged to conflict with the federal Agricultural Fair Practices Act of 1967. The Michigan Supreme Court found that the state law was not preempted by the federal Act.

1. The federal Agricultural Fair Practices Act of 1967 (AFPA), 7 U.S.C. 2301 *et seq.*, guarantees farmers and other producers of agricultural commodities (producers)[1]

[1] 7 U.S.C. 2302(b) provides:

> The term "producer" means a person engaged in the production of agricultural products as a farmer, planter, rancher, dairyman, fruit, vegetable, or nut grower.

the freedom to join cooperative associations without fear of reprisal from those who acquire agricultural products (handlers).[2] 7 U.S.C. 2303 makes it unlawful for any handler to engage in practices that interfere with a producer's freedom to associate. Section 2303(a) prohibits any handler to "coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers * * *." Section 2303(b) forbids handlers to discriminate against producers concerning price, quantity, quality, or terms of purchase, because of membership in an association. Section 2303(c) forbids handlers to coerce producers into, or out of, a membership agreement or contract with an association. Section 2303(d) prohibits handlers to offer money or other inducements to keep producers from joining an association. Handlers are also forbidden to make false reports about the finances, management, or activities of associations (7 U.S.C. 2303(e)).

Although the Act forbids handlers to interfere with a producer's decision to join (or not to join) an association, it does not prevent handlers and producers from dealing or refusing to deal with one another for other reasons. 7 U.S.C. 2304 states that "[n]othing in this chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in or contract with an association of producers, nor require a handler to deal with an association of producers." The Act does not attempt to occupy the entire field of regulation. Its provisions "shall not be construed to change or modify existing State law nor to deprive the proper State courts of jurisdiction" (7 U.S.C. 2305(d)).

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[2] 7 U.S.C. 2302(a) provides:

> The term "handler" means any person engaged in the business or practice of (1) acquiring agricultural products from producers or associations of producers for processing or sale; or (2) grading, packaging, handling, storing, or processing agricultural products received from producers or associations of producers; or (3) contracting or negotiating contracts or other arrangements, written or oral, with or on behalf of producers or associations of producers with respect to the production or marketing of any agricultural product; or (4) acting as an agent or broker for a handler in the performance of any function or act specified in clause (1), (2), or (3) of this paragraph.

2. The Michigan Agricultural Marketing and Bargaining Act, Mich. Comp. Laws § 290.701 *et seq.* (1979), enacted in 1972, makes illegal the same handler conduct forbidden by the AFPA. Mich. Comp. Laws § 290.704(1). But the Michigan Act goes beyond the federal Act by regulating producers as well as handlers. It creates an Agricultural Marketing and Bargaining Board, within the Michigan Department of Agriculture, that accredits producer associations and mediates disputes. Mich. Comp. Laws §§ 290.703, 290.707, 290.715. The Michigan Act forbids associations to discriminate against producers; to refuse to bargain with handlers with whom the association or its members have had substantial prior dealing; to coerce or intimidate handlers in certain respects; and to make unsubstantiated reports about the finances, management, or activities of other associations or handlers. Mich. Comp. Laws § 290.704(2).

To be accredited, an association must have marketing and bargaining contracts (for the relevant period) with more than 50% of the producers in the bargaining unit. These contracts must also include more than 50% of the commodity produced in the bargaining unit. Mich. Comp. Laws § 290.707(c). Once accredited, the association acts as the exclusive bargaining agent for all producers in the bargaining unit, and producers must pay a service fee to the association. A producer must pay the fee, and abide by the terms of the contracts negotiated with handlers, even if he chooses not to become a member of the association. Mich. Comp. Laws §§ 290.710(1), 290.713(1).

3. The Michigan Agricultural Cooperative Marketing Association, Inc. (MACMA) is an association accredited under the Michigan Act. It is the sole sales and bargaining representative for certain Michigan producers for asparagus. In 1974 MACMA negotiated contracts with handlers. Shortly thereafter appellants (representatives of handlers and producers) sued in the Ingham County Circuit Court for a declaration that the portions of the Michigan Act requiring service fees, and mandatory producer adherence to the association contracts, were preempted by the federal Act. The circuit court ruled that the case could be brought only in the Michigan Court of Appeals, and dismissed (J.S.

App. A33-A37). The Michigan Court of Appeals also dismissed for want of jurisdiction (*id.* at A38-A39), and an appeal was taken to the Michigan Supreme Court. The Michigan Supreme Court remanded the matter to the circuit court, which it found was empowered to hear the case (*id.* at A44-A59). After a non-jury trial the circuit court ruled that the state statute was not preempted (*id.* at A60-A76).

4. The Michigan Supreme Court affirmed (J.S. App. A1-A32). Appellants argued that the federal Act gave handlers a right to deal with producers of their choice, and producers a right to deal with handlers of their choice. They urged that the Michigan Act, by requiring all producers in a bargaining unit to pay a service fee and adhere to the terms of the contract negotiated by the association, violated these rights.

The Michigan Supreme Court rejected that claim. It found the federal Act limited to preventing certain kinds of *handler* misconduct. The court thus viewed Michigan's regulation of *producers* as a step into an area that the federal government had not attempted to regulate (J.S. App. A14):

> In our view, the provisions of AMABA affording exclusive representation to a producers' cooperative created by a majority of the producers of a particular commodity, and the requirement of service fees, was a step by the Michigan Legislature into a previously unregulated area; a step which furthers both the goals of [the AFPA] and others not prevented by [the AFPA] by taking an active role in enhancing the bargaining position of producers, protecting not only individuals, but also their associations from internal and external pressures.

The court also rejected appellants' argument that compliance with the two statutes was physically impossible (J.S. A16-A17).

SUMMARY OF ARGUMENT

1. The Michigan Act, insofar as it requires all producers in an accredited bargaining unit to pay a service fee and adhere to the terms of the contract negotiated by the association, frustrates the purposes and objectives of the AFPA.

It is evident from the language of the federal Act that Congress explicitly forbade associations to coerce individual producers into joining an association, making or maintaining a marketing contract with an association, or terminating contractual relationships individually negotiated with handlers. 7 U.S.C. 2303(a) and (c) (prohibited practices); *id.* § 2302(a) and (d) (prohibited practices section applies to associations).

That conclusion emerges even more clearly from the legislative history of the AFPA. The version of the Act first introduced made no mention of a producer's right to remain independent from marketing and bargaining associations. That omission was the primary focus for criticism of the bill in the Senate hearings. Opponents of the bill gave a number of reasons for inclusion of such a right. In some cases handlers were in direct competition with cooperative associations that performed processing or marketing functions for their members. In such cases compulsory association membership would have the effect of driving competing handlers out of business. And even where the association acted only as a bargaining agent for producers, handlers felt that if membership were not voluntary they would lose both the price advantages and control over product quality that they enjoyed in direct dealing with independent producers. Similar fears were expressed by some producers, who felt that they could fare better (because of the quality of their products) by dealing independently than they could through an association. Still another concern frequently voiced was that compulsory association membership could result in producer monopolies, and thereby frustrate the policies of the antitrust laws. Finally, it was urged that a desirable competition among cooperative associations for members would be impeded if producer membership were not voluntary.

As a result of these concerns, the Senate amended the original bill to provide specifically that individual farmers should be "free to join together *or not to join together* in cooperative organizations" (113 Cong. Rec. 21410 (1967) (emphasis added)). The prohibited practices section of the Senate bill was also explicitly addressed to "any handler *or association of producers*" (*ibid.* (emphasis added)).

In the House hearings the Senate amendments were fully discussed, and the House Committee on Agriculture consciously decided to make no change in the prohibited practices section. The phrase "free to join together or not to join together" in the opening section of the bill was simply amended to read "free to join together voluntarily" (H.R. Rep. 824, 90th Cong., 1st Sess. 3 (1967)).

On the floor of the House the phrase "association of producers" was deleted from the prohibited practices section. It was stressed, however, that since associations were already included in the definition of "handler," the deletion worked no substantive change in the bill. 114 Cong. Rec. 7464 (1968) (remarks of Rep. Sisk). Among the reasons discussed for preserving the producer's right not to join an association was that "[t]he fees being charged by these associations are no small matter to the farmer." 114 Cong. Rec. 7450 (1968) (remarks of Rep. Latta).

2. The Michigan Supreme Court held that the AFPA, while it forbids associations to coerce individual producers into becoming members, does not apply to similar action by the states. Michigan's Act, however, does nothing more than empower associations that are sufficiently large to do what the AFPA forbids. It is essentially no different from the Louisiana "nonsigner" law that this Court held to be preempted by the Sherman Act in *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384 (1951). The analogy is particularly apt since one of the very reasons for requiring voluntary association membership in the AFPA was the concern that any other course would undermine the policies of the antitrust laws.

Nor is it significant that Michigan's Act does not require nonsigning producers to formally join an accredited association. In the first place, the AFPA forbids not only compulsory membership but also forcing any producer to "enter into * * * [a] marketing contract with an association" (7 U.S.C. 2303(c)). In any event, the distinction between formal membership and what the Michigan Act requires is insubstantial, since independent producers are required to pay dues to the association and are bound by the terms of its bargain with handlers.

3. Appellants also argue that Congress in the AFPA intended "to protect a processor's right to deal individually with farmers" (J.S. 18), and that the Michigan Act conflicts with that right. We doubt that that is so. The Senate report makes clear that Congress did not intend to "prevent or require" any particular form of dealing between processors, on the one hand, and producers or associations on the other. S. Rep. 474, 90th Cong., 1st Sess. 7 (1967). And the House report specifically states that "the scope of the bill embrace[s] only the prohibited acts in section 4" (H.R. Rep. 824, *supra*, at 5), which protects individual producers, not processors.

ARGUMENT

BY COMPELLING INDIVIDUAL PRODUCERS TO SUPPORT ACCREDITED ASSOCIATIONS AND ADHERE TO THE TERMS OF CONTRACTS NEGOTIATED BY SUCH ASSOCIATIONS, THE MICHIGAN ACT FRUSTRATES THE PURPOSES AND OBJECTIVES OF THE AGRICULTURAL FAIR PRACTICES ACT

This Court has held that federal regulation should not be deemed to preempt state regulatory power except for persuasive reasons. If there is no explicit preemptive language, the federal action must touch a field where federal regulation is dominant, or there must be an actual conflict with federal law. *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982). Here there is no explicit preemptive language. The federal Act states that it "shall not be construed to change or modify existing State law" (7 U.S.C. 2305(d)).[3] Nor, as appellants admit, is the

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[3] The intent of Section 2305(d), however, is somewhat more restricted than its language might suggest. It was not intended to give an imprimatur to all state laws regardless of how they might conflict with the AFPA. In fact, the version of that provision passed by the Senate provided simply that "[t]he foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction." 113 Cong. Rec. 21410 (1967). That was modified to its current form by the House Committee on Agriculture, which stated by way of explanation (H.R. Rep. 824, *supra*, at 4, 6:

> This amendment was adopted to clarify the committee's intent that no State law should be superseded or preempted by this leg-

federal interest so dominant that the field of regulation has been entirely occupied (J.S. 8). This Court has recognized that "the supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 144 (1963).

The question, therefore, is whether the state and federal Acts are in conflict—that is, whether compliance with both is "a physical impossibility" (373 U.S. at 142-143), or whether state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941); *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. at 154-159. This in turn depends upon "Congress' intent in enacting the federal statute at issue." *Shaw* v. *Delta Air Lines, Inc.*, No. 81-1578 (June 24, 1983), slip op. 9.

1. We believe that insofar as the Michigan Act requires all producers in a bargaining unit to pay a service fee and adhere to the terms of the contract negotiated by the association, it frustrates the "purposes and objectives" of the AFPA. That conclusion is not compelled by the principal thrust of the federal Act, which in general is designed to prevent handlers from interfering with the formation of cooperative associations by exerting pressure on individual farmers. Nor does the federal Act attempt to address in a comprehensive way—as the Michigan Act does—the collective bargaining rights of producers and handlers. See 114 Cong. Rec. 7453-7454 (1968) (remarks of Rep. Poage);

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islation which is supplementary to and not in replacement of all other existing legal remedies.

* * * * *

The last sentence of section 6 specifically retains all existing legal remedies available under State law.

Such remedies might include, for example, damages or an injunction for malicious interference with contractual relationships. See, *e.g.*, *Pure Milk Products Co-op.* v. *National Farmers Organization*, 332 F. Supp. 866, 868 (E.D. Wis. 1971).

id. at 7456 (remarks of Rep. May).[4] Nevertheless, both the explicit terms of the federal Act and its legislative history indicate that Congress intended to protect individual producers against any sort of compulsion to join (or be effectively controlled by) cooperative associations. The Michigan Act stands as an obstacle to that purpose.

a. The congressional findings and declaration of policy with which the AFPA begins state that (7 U.S.C. 2301 (emphasis added)):

> the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together *voluntarily* in cooperative organizations as authorized by law.

The succeeding sections of the Act make clear the significance of the word "voluntarily." It signifies freedom from pressure either by processors (to stay out of an association) or by associations (to join or contract with an association).[5]

7 U.S.C. 2303, the prohibited practices section, provides that (emphasis added):

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[4] Moreover, this Court has recognized that the states retain authority to regulate directly the marketing of agricultural products— including such matters as the price and quantity of commodities sold. *Parker* v. *Brown*, 317 U.S. 341 (1943). And it might be argued that direct state control of agricultural marketing interferes no less with the freedom of individual producers than the exercise of similar power by cooperative associations. But as this Court has noted in other contexts, there often are substantial differences between direct state control of prices, for example, and delegation of the same control to private parties. Compare *Parker* v. *Brown*, *supra*, with *Californic Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Cf. *Larkin* v. *Grendel's Den, Inc.*, No. 81-878 (Dec. 13, 1982), slip op. 6.

We note that within the State of Michigan, federal marketing orders under the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*) are in effect only for cranberries and cherries. See 7 C.F.R. Pts. 929-930. Except for milk marketing orders, federal marketing orders generally do not establish a price for the regulated commodity but instead regulate the flow of commodities to market. See 7 U.S.C. 608c(6).

[5] In fact the word "voluntarily" was substituted by the House Committee on Agriculture for the phrase "free to join *or not to join* together," which appeared in the version of the bill passed by the Senate. H.R. Rep. 824, *supra*, at 3.

> It shall be unlawful for any handler knowingly to * * * engage in the following practices:
>
> (a) *To coerce any producer in the exercise of his right* to join and belong to or *to refrain from joining or belonging to an association of producers;* or
>
> * * * * *
>
> (c) *To coerce or intimidate any producer to enter into, maintain,* breach, cancel, or terminate *a membership agreement or marketing contract with an association of producers* or a contract with a handler * * *.

The term "handler" is defined in 7 U.S.C. 2302(a) (emphasis added):

> The term "handler" means *any person* engaged in the business or practice of * * * (3) *contracting or negotiating contracts or other arrangements* * * * *on behalf of producers* * * * with respect to the production or marketing of any agricultural product * * *.

And "[t]he term 'person' includes * * * associations." 7 U.S.C. 2302(d). In short, the federal Act forbids an association of producers (which negotiates marketing contracts and other arrangements on behalf of producers) to coerce individual producers into joining the association, staying in the association, or making or maintaining a marketing contract with the association. See *Butz* v. *Lawson Milk Co.*, 386 F. Supp. 227, 235 (N.D. Ohio 1974) (an association of producers is a "handler" within the meaning of the AFPA); *Marketing Assistance Plan, Inc.* v. *Associated Milk Producers, Inc.*, 338 F. Supp. 1019, 1024 (S.D. Tex. 1972) (same).

The disclaimer section of the Act also emphasizes that Congress envisioned a market in which individual producers would choose to remain apart from associations and negotiate their own terms with handlers. 7 U.S.C. 2304:

> Nothing in this chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in or contract with an association of producers, nor require a handler to deal with an association of producers.

b. The legislative history of the AFPA shows, even more plainly than the language of the Act itself, that Congress intended to shield producers from compulsory membership in an association. The bill originally introduced in the Senate, S. 109, 89th Cong., 1st Sess. (1965), made no reference to producers' rights to refrain from joining or dealing with associations. Those rights may have been presumed to exist, since S. 109 was first drafted as an amendment to the Capper-Volstead Act (7 U.S.C. 291-292),[6] and producers could not be compelled to join cooperatives authorized by that Act. See *Alexander* v. *National Farmers Organization*, 687 F.2d 1173, 1182 (8th Cir. 1982), cert. denied, No. 82-1586 (May 16, 1983); *Otto Milk Co.* v. *United Dairy Farmers Coop. Ass'n*, 388 F.2d 789 (3d Cir. 1967); *Gulf Coast Shrimpers & Oystermans Ass'n* v. *United States*, 236 F.2d 658, 665 (5th Cir.), cert. denied, 352 U.S. 927 (1956). Cf. *Maryland & Virginia Milk Producers Ass'n* v. *United States*, 362 U.S. 458, 467 (1960); *Columbia River Packers Ass'n* v. *Hinton*, 315 U.S. 143 (1942). The right to remain independent was not made explicit, however, and that aspect of the bill was the focal point for criticism in the Senate hearings.

Two major, and related, concerns were expressed by those testifying against the original version of S. 109. The first was that, because the bill did not recognize the right of producers to remain independent, farmers and ranchers could be forced to join marketing and bargaining associations. The second was that that fact (coupled with the kinds of practices prohibited by the bill) would make it impossible for handlers to deal individually with the producers of their choice.

A number of reasons underlay these concerns. One was that, in the case of some commodities, cooperative associations were actually in competition with handlers, and compulsory membership in an association would have the effect

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[6] S. 109 was later modified to "stand[] on its own base, rather than amend[] the Capper-Volstead Act." *Discrimination Against Members of Farmer Cooperatives: Hearings on S. 109 Before the Subcomm. of the Senate Comm. on Agriculture and Forestry*, 89th Cong., 2d Sess. 177 (1966) [hereinafter cited as *1966 Senate Hearings*].

of driving competing handlers out of business. This would be true, for example, where a cooperative provided facilities for ginning cotton for its members.[7] A related concern was that the emphasis on producer bargaining power and the possibility of compulsory membership were out of place where producers did not contract directly with handlers because there were open markets where their commodities could be sold.[8] A third reason for the concern about forced membership in an association was that handlers feared losing control over the quality of the product they purchased, not to mention whatever price advantages they enjoyed in dealing directly with independent producers.[9] Similar fears

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[7] See, *e.g.*, *1966 Senate Hearings* 135 (statement of A. Starke Taylor, Jr., Independent Cotton Industries Association), 138-140 (statement of Paul L. Courtney, National Association of Wholesalers), 206 (statement of Donald G. Smith, Texas Independent Ginners Association); *Agricultural Producers Marketing Act: Hearings on S. 109 Before the Subcomm. of the Senate Comm. on Agriculture and Forestry*, 90th Cong., 1st Sess. 122-123 (1967) [hereinafter cited as *1967 Senate Hearings*] (statement of Herman Eubank, Texas Independent Ginners Association). In the version of the AFPA ultimately enacted, cotton was exempted from the definition of "agricultural products." 7 U.S.C. 2302(e).

The Michigan Agricultural Marketing and Bargaining Act provides that to be accredited, an association must have contracts covering more than 50% of the quantity of a commodity produced in the bargaining unit. In computing that quantity, there is excluded "any quantity * * * contracted by producers with producer owned and controlled processing cooperatives * * *." Mich. Comp. Laws § 290.707(c).

[8] Compare *1966 Senate Hearings* 82 (statement of Dal Ferry, United States Poultry & Egg Producers Association) with *id.* at 41 (statement of Don F. Magdanz, National Livestock Feeders Association), 101-102 (statement of Charles E. Connor, Independent Livestock Marketing Association), and *1967 Senate Hearings* 198 (statement of Don F. Magdanz).

[9] See, *e.g.*, *1966 Senate Hearings* 124 (statement of Edward Dunkelberger, National Canners Association), 195-196 (statement of Edward Dunkelberger); *1967 Senate Hearings* 21 (statement of Orville L. Freeman, Secretary of Agriculture), 24 (statement of Charles B. Shuman, American Farm Bureau Federation), 69 (statement of Edward Brown Williams, National Association of Frozen Food Packers), 84-86 (statement of Edward Dunkelberger), 91-92, 94 (statement of G. Ted Cameron, National Broiler Council), 207-208 (statement of John D. Snow, Potato Processors of Idaho Association), 210 (statement

were expressed by at least some producers, who felt that the quality of their products would bring a better return if they were able to remain independent.[10] A fourth reason, frequently voiced, was that the policies of the federal antitrust laws—already modified by allowing producers to combine for purposes of marketing and bargaining, see 7 U.S.C. 291-292, 15 U.S.C. 17—would be undermined altogether if membership in cooperative associations were not voluntary.[11] Such a result would, of course, work to the detriment of consumers as well as handlers. Still a fifth reason, expressed among others by the Department of Agriculture, was that any suggestion that producers could be compelled to join cooperative associations could frustrate a desirable competition among cooperatives.[12] Finally, a number of witnesses simply indicated a feeling that the freedom to remain independent of an association was "a basic American right" that should not be restricted in the otherwise desirable effort to promote producer bargaining power.[13]

The solution to the concerns about compulsory association membership and prevention of direct dealing between handlers and producers took two forms in the bill passed by

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of Bert Tollefson, Jr., American Corn Millers Federation), 211 (statement of Don. M. Turnbull, American Poultry and Hatchery Federation).

[10] See, *e.g.*, *1967 Senate Hearings* 32 (statement of Ralph B. Bunje, California Canning Peach Association), 173-183 (statement of Paul L. Phillips).

[11] See, *e.g.*, *1966 Senate Hearings* 135-136 (statement of A. Starke Taylor, Jr., Independent Cotton Industries Association); *1967 Senate Hearings* 70 (statement of Edward Brown Williams, National Association of Frozen Food Packers), 104-105, 110, 112-114 (statement of W.W. Holding III, American Cotton Shippers Association), 144 & n.2, 151 (statement of Earl W. Kintner, National Tax Equality Association), 196 (statement of Irving Isaacson, Maine Poultry Associates).

[12] See, *e.g.*, *1966 Senate Hearings* 181 (statement of David W. Angevine, USDA Farmer Cooperative Service), 187 (statement of Sen. Aiken), 189-190 (statement of Harry L. Graham, National Grange).

[13] See, *e.g.*, *1967 Senate Hearings* 10-11 (statement of Sen. Williams); *1966 Senate Hearings* 146 (statement of Donald G. Smith, Texas Independent Ginners Association). Cf. *1967 Senate Hearings* 13-14 (statement of Sen. Lausche).

the Senate. The first was the creation of a statutory right for producers to refrain from joining or contracting with an association. The second was a disclaimer of intent to prevent individual dealing between handlers and producers.

The final Senate bill opened with a legislative finding and declaration of policy that (113 Cong. Rec. 21410 (1967)):

> SEC. 2 * * * [T]he marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together or not to join together in cooperative organizations as authorized by law.

It then went on to state, in the prohibited practices section (*ibid.* (emphasis added)):

> SEC. 4 *It shall be unlawful for any* handler or *association of producers* knowingly to engage * * * in the following practices:
>
> (a) To coerce any producer in the exercise of his right to join and belong to or *to refrain from joining or belonging to an association of producers*[;]
>
> * * * * *
>
> (c) *To coerce or intimidate any producer* or other person *to enter into* [*or*] *maintain* * * * *a membership agreement or marketing contract with an association* of producers * * *.

The Senate report concerning that section stated:

> The objective of the bill is to protect the producer in the exercise of a free choice. Many witnesses suggested that the bill did not fully accomplish this purpose, because it protected the producer only from improper pressure not to join an association. To protect his free choice he should also be protected from improper pressure in the other direction, that is, improper pressure to join an association. The committee * * * was convinced by the logic of the situation that if the objective is to protect the producer and afford him a free choice, the bill should protect him from pressure in either direction.
>
> * * * * *
>
> Many witnesses, including individual producers, testified that as well as being free from interference in electing to join or not join an association, the producer should be free from improper pressure to interfere

with his arrangements and dealings with handlers; and the committee substitute would provide him with this protection.

S. Rep. 474, *supra*, at 5-6.

The report went on to note (*id.* at 6) that although "section 4(a) prohibits coercion on the part of both the handler and the association of producers," Section 4(d), which dealt with inducements or rewards (cf. 7 U.S.C. 2303(d)), should only apply to the former. "[T]he association of producers should not be prohibited from offering inducements to producers to belong to an association, since it is quite proper for the association to pursue vigorously the *voluntary* organization of farmers in its attempt to secure a better bargaining position for farmers." S. Rep. 474, *supra*, at 6 (emphasis added).[14]

The explanation of the disclaimer section (113 Cong. Rec. 21410 (1967)) emphasizes that, rather than creating rights not mentioned elsewhere, that section was intended to reemphasize two points implicit in the bill. The first was that where both producer and handler are willing, they may deal individually rather than through an association. The second was that where a producer chose to join an association the handler could refuse to bargain with the association on his behalf for "good, sound economic reasons," though it could not refuse to do so simply because of his association membership. S. Rep. 474, *supra*, at 7.

S. 109 was passed by the Senate in the form reported out by the Committee on Agriculture and Forestry (113 Cong. Rec. 21411 (1967)). Senator Aiken, the bill's sponsor, briefly summarized it by saying (*ibid.*): "This bill * * * is designed to protect the agricultural producer's right to decide, free from improper pressures, whether or not he wishes to belong to a marketing or bargaining association."

The bill was referred to the House Committee on Agriculture (113 Cong. Rec. 21582 (1967)), which conducted its own hearings the following month. *Agricultural Fair*

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[14] 7 U.S.C. 2303(d), like the original Senate version, still only applies to prohibit handlers from offering "any * * * inducement or reward to a producer for *refusing to or ceasing to belong* to an association of producers" (emphasis added).

Trade Practices: Hearings on S. 109 Before the House Comm. on Agriculture, 90th Cong., 1st Sess. (1967) [hereinafter cited as *1967 House Hearings*]. At those hearings it seemed, in the words of one participant, "that the passengers [had] changed trains. The proponents of the original bill [were], to a very large degree, opponents of the amended bill. The opponents of the original bill [were] proponents of the present bill" (*id.* at 173) (statement of Walter R. Collett, Oregon-Washington Vegetable & Fruit Growers Association). Representatives of producers' associations objected repeatedly to the provisions granting producers a right to refrain from joining associations.[15] By contrast, a number of different groups that had urged inclusion of that right in the Senate bill expressed their satisfaction with the bill and reiterated their concerns with the original version.[16]

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[15] See, *e.g.*, *1967 House Housings* 66-67 (statement of Harry L. Graham, National Grange), 79 (statement of Tony T. Dechant, National Farmers Union), 89-90 (statement of Robert N. Hampton, National Council of Farmer Cooperatives), 109-110, 115-116 (statement of Ralph B. Bunje, California Canning Peach Association). See also *id.* at 125 (statement of Rep. Matsunaga). The Department of Agriculture, which had played a large part in incorporating those provisions in the Senate bill, changed its position and attacked them in the House. *Id.* at 8-10, 15-17, 26-28 (statements of John A. Baker and John C. Bagwell, USDA). See R. Torgerson, *Producer Power at the Bargaining Table: A Case Study of the Legislative Life of S. 109*, at 81-84, 156 (1970).

The American Farm Bureau, while noting the amendments made in the Senate, continued to support the bill nonetheless. *1967 House Hearings*, 39, 41-42 (statement of Allen A. Lauterbach). It suggested, however, that the phrase "free to join together or not to join together in cooperative associations" appearing in the findings and declaration of policy be changed to read "free to join together voluntarily in cooperative associations" (*id.* at 42). That suggestion was accepted by the House. See note 5, *supra*, and 7 U.S.C. 2301.

[16] See, *e.g.*, *1967 House Hearings* 36 (statement of Rep. Schwengel), 91-92 (statement of E. Clinton Stokes, Chamber of Commerce of the United States), 128 (statement of C.E. Connor, Independent Livestock Marketing Association), 135, 137 (statement of Edward Dunkelberger, National Canners Association), 148-149 (statement of Edward Brown Williams, National Association of Frozen Food Packers), 154-158 (statement of G. Ted Cameron, National Broiler Council), 168-169 (statement of Donald Wilber), 169-170 (statement of

As a result of its hearings the House Committee made a number of minor changes not relevant here. But it specifically rejected a proposal "to delete the application of any prohibited practices or sanctions to associations of producers * * *. The committee felt that in those limited instances where cooperative associations are covered, the application of the bill is both justified and in the interest of producers themselves." H.R. Rep. 824, 90th Cong., 1st Sess. 4-5 (1967). It also declined the invitation to delete the disclaimer provision, "since the scope of the bill embraced only the prohibited acts in section 4" (*id.* at 5).

After a compromise in the Committee on Rules, however, the House deleted the phrase "or association of producers" from the prohibited practices section of the bill. See 114 Cong. Rec. 7449 (1968). Representative Sisk, on behalf of the Rules Committee, explained the change (*id.* at 7464):

> Since the bill already makes clear that associations of producers are not excluded from the term "handler," this phrase is redundant and could be misconstrued as unfairly pointing the finger of accusation to associations of producers. This is not the intent; and while my amendments do not change the purpose or basic meaning of the bill, they make misinterpretation more difficult.

Representative Poage, Chairman of the House Committee on Agriculture, expressed a similar understanding of what the bill would do (114 Cong. Rec. 7451, 7452 (1968)):

> [W]e wanted to make this bill apply in both directions—to make of it a two-way street—to make of it a protector of the right of the producer to determine for himself whether he cared to or did not care to become a member of a cooperative.
>
> We * * * would actually assure to any producer the right to belong or not to belong to a cooperative.
>
> * * * * * *
>
> The only thing which the co-ops cannot do is to go out and coerce a nonmember into becoming a member of

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James A. Steele), 170-172 (statement of Paul L. Phillips, Tri-County Poultry Association).

> the co-op and thereby come under the legislation. That is the only thing which this bill does not permit.

See also *id.* at 7450 (remarks of Rep. Latta) ("the farmers of this Nation will still have the right * * * to say to an association, 'I do not want to join your association and you cannot force me into it' "). Among the reasons for preserving the producer's right not to join an association, according to Representative Latta, was that "[t]he fees being charged by these associations are no small matter to the farmer. * * * Some of these associations are assessing members 1 percent of [their] gross. That is $250 out of that farmer's pocket to belong to the association" (*ibid.*).

2.a. The Michigan Supreme Court believed that "[w]hile § 2303 makes it unlawful for a handler to coerce a producer to 'join or belong to' an association, it does not forbid a *state* from requiring exclusive representation of individual producers where a producer majority sees fit" (J.S. App. A10 (emphasis in original; footnote omitted)).[17] But all that the Michigan Act does is empower an association of producers—once it has attained the requisite size—to do what the federal Act forbids. A state may no more do this than it may empower other "handlers" to violate the terms of the federal Act. Michigan could not, for example, authorize food processors to make loans to farmers as an inducement for rejecting association membership (see 7 U.S.C. 2303(d)), even if most processors—and for that matter most farmers—found that course of action desirable.

One may find a useful analogy to Michigan's Act in the Louisiana "nonsigner" statute held to be preempted in *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384 (1951). The Miller-Tydings Act (ch. 690, 50 Stat. 693) interpreted in *Schwegmann Bros.* amended Section 1 of the Sherman Act, 15 U.S.C. 1, to provide that "nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale" of specified commodities, if

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[17] We assume that, in using the term "handler," the court meant to include an association. See 7 U.S.C. 2302(a); J.S. App. A5 n.7. Nothing on the face of the court's opinion expressly so indicates, however. See J.S. 16.

state law permits such agreements.[18] Louisiana went further. Its statute provided that once a distributor and retailer contracted to fix the resale price, other retailers of the same commodity who were "nonsigners" of the contract were also bound by the agreed-upon price. 341 U.S. at 386-387. This Court concluded that the state's law went beyond the voluntary price-fixing by contract or agreement permitted by the Miller-Tydings Act: "when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids" (341 U.S. at 389).

In this case the issue is whether the private conduct demanded by Michigan is forbidden by the AFPA, rather than by the Sherman Act. But the legislative history of the AFPA demonstrates that one of the reasons frequently advanced for making association membership voluntary was that compulsion could frustrate the policies expressed in the Sherman Act. See page 13 & note 11, *supra*. See generally, Note, *Trust Busting Down on the Farm: Narrowing the Scope of the Antitrust Exemptions for Agricultural Cooperatives*, 61 Va. L. Rev. 341 (1975). In this case Michigan's Act provides that if a sufficient number of producers join together and come to an agreement with handlers on the price (and other terms) at which their commodity will be sold, then producers who are nonsigners of the agreement are also bound. Mich. Comp. Laws § 290.713(1).[19] That is similar to Louisiana's requirement

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[18] The Miller-Tydings Act was amended after the decision in *Schwegmann Bros.* by the McGuire Act (ch. 745, §§ 1-2, 66 Stat. 631-632) to permit fair trade pricing of articles for retail sale. The McGuire Act in turn was repealed by the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801.

[19] We note that the Michigan Act, though it requires all producers in the bargaining unit to adhere to the price and other terms negotiated by an accredited association, neither requires that prices be fixed in all cases (rather, only when 50% of the producers, responsible for 50% of the quantity, agree among themselves), nor provides for any supervision of the prices agreed upon. Thus, it does not resemble those cases that fall within the state action exemption to the Sherman Act. Rather, it envisions a system of restraints on competition imposed by private parties with "state authorization, approval, encouragement, [or]

that once a retailer and a distributor come to an agreement on the resale price for their commodity, nonsigning retailers are bound to market at the same price. But as a number of witnesses pointed out during the passage of the AFPA:

> "[The] justification for the agricultural cooperative exemption [from the antitrust laws] is to allow the farmers to overcome exploitation and earn a reasonably competitive profit. Its purpose is not to allow a monopoly profit.
>
> This also explains why it is important that membership in cooperatives be voluntary, that cooperatives not be permitted to coerce outsiders by shutting off their access to markets. This requirement not only protects the farmers' basic interest in freedom of association, but it also increases the likelihood that cooperatives will be able to earn competitive profits but unable to achieve monopoly profits."

1967 Senate Hearings 110 (statement of W.W. Holding III, American Cotton Shippers Association (quoting an address by Donald F. Turner, Assistant Attorney General, to the National Council of Fruit and Bargaining Cooperatives)); see also *id.* at 70 (statement of Edward Brown Williams, National Association of Frozen Food Packers); *1966 Senate Hearings* 136 (statement of A. Starke Taylor, Jr., Independent Cotton Industries Association).

Concern about frustrating the policies of the antitrust laws was only one of a number of reasons advanced for

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participation." *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 592-593 (1976) (footnotes omitted). Cf. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (price-fixing compelled by state law; prices set by private parties not supervised by the state); *United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 702 F.2d 532 (5th Cir. 1983) (en banc), petition for cert. pending, No. 82-1922 (price-fixing authorized but not compelled by state law); *United States* v. *Title Insurance Rating Bureau, Inc.*, 700 F.2d 1247, 1253 (9th Cir. 1983), petition for cert. pending, No. 83-154.

Of course, unlike those cases, here federal law permits agricultural producers to join together voluntarily to set prices for marketing and bargaining quite apart from any provision in state law. See 7 U.S.C. 2301 *et seq.* (AFPA); 7 U.S.C. 291-292 (Capper-Volstead Act); 15 U.S.C. 17 (Clayton Act). Federal law does not, however, permit associations to bind nonmembers to the terms of their agreements.

securing to producers the right to negotiate individually with handlers. But Michigan's law could undermine other justifications for that right as well. For example, Section 13 of the Michigan Act (Mich. Comp. Laws § 270.713(1)) binds nonmember producers not only to the price negotiated by an accredited association, but also to its "[q]uality specifications," in the nonmember's dealings with handlers. One of the concerns frequently voiced by handlers about forced membership in an association, however, was that they would lose control over the quality of the product they purchased. A similar fear was expressed by some producers who felt that the quality of their products would bring a better return if they were able to remain independent. See pages 12-13 & notes 9-10, *supra*.

Another justification for stipulating that membership must be voluntary was the fear that compulsory membership could frustrate a desirable competition among cooperatives. See page 13 & note 12, *supra*. What effect the Michigan Act will have on such competition is difficult to predict, though it may not be negligible. In large part it will depend on how the state defines the appropriate bargaining units. That matter is addressed in Section 6 of the Act (Mich. Comp. Laws § 290.706); it directs the state Agricultural Marketing and Bargaining Board to define "the largest bargaining unit" possible consistent with seven criteria, only one of which is "[t]he wishes of the producers." Mich. Comp. Laws § 290.706(2)(f). See also *id.* § 290.712 (revocation of accreditation).

b. Appellees have also suggested that the Michigan Act does not frustrate the purposes of the AFPA because, while it requires exclusive representation and payment of dues, it does not insist that producers actually become members of an accredited association. Motion to Dismiss 4-6. But the AFPA does not simply forbid compelling producers to join an association (see 7 U.S.C. 2303(a)). It also prohibits an association (7 U.S.C. 2303(c)):

> To coerce or intimidate any producer to enter into, maintain, breach, cancel, or terminate a membership agreement or marketing contract with an association of producers or a contract with a handler * * *.

As the Senate report noted, the federal Act intended to leave an individual producer "free from improper pressure to interfere with his arrangements and dealings with handlers" (S. Rep. 474, *supra*, at 6). Whether or not a producer in the bargaining unit joins the association, he is bound under the Michigan Act—when dealing separately and individually with a handler—by the terms and conditions of the contract negotiated by the association with handlers (J.S. App. A6).

The requirement that nonmember producers also pay dues to an accredited association fares no better. As Representative Latta stated in the course of the House debates, one of the reasons for protecting producers' freedom to refrain from joining an association was to avoid imposing on the unwilling the obligation of paying fees that could amount to "1 percent of [a producer's] gross" (114 Cong. Rec. 7450 (1968)). With respect to the aims of the federal Act, it is difficult to avoid the conclusion that the requirements imposed by the State of Michigan are the "practical equivalent" of a requirement of formal membership. Cf. *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 743 (1963); *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 217 n.10 (1977). The only effective difference between members and nonmembers is that the latter do not participate in the association's decision-making process.

3. Appellants also argue that Congress in the federal Act intended "to protect a processor's right to deal individually with farmers" (J.S. 18), and that the Michigan Act conflicts with that right. It is true that Mich. Comp. Laws § 290.713(1) makes "[a]n accredited association * * * the exclusive representative of all producers in the bargaining unit for the purpose of bargaining with all handlers that purchase the agricultural commodity produced in the bargaining unit." And, as noted above, even producers who have not joined the association are bound "by all terms and conditions of the contract negotiated with handlers" (J.S. App. A6). Appellants contend that that requirement runs afoul of 7 U.S.C. 2304, which states:

> Disclaimer of intention to prohibit formal dealing
>
> Nothing in this chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in

> or contract with an association of producers, nor require a handler to deal with an association of producers.

The Michigan Supreme Court, by contrast, found that Section 2304 was nothing more than its caption suggests: a "[d]isclaimer of intention to prohibit normal dealing" (J.S. App. A8). "There is no logical nexus," the court said, "between a provision declaring 'this is what we did not do' and the conclusion that 'what we did not do, cannot therefore be done'" (*id.* at A7). It found this interpretation to be supported both by the prohibited practices section of the Act (7 U.S.C. 2303) and by the legislative history (J.S. App. A9-A14).

We doubt that the AFPA was intended, as appellants have argued (J.S. App. A7 (emphasis in original)), to strike "a careful balance" among "the conflicting interests of individual producers, processors, and associations[,]" and to create or protect "a *processor's* right to deal with the individual farmer of his choice." In addressing the matter of handler dealings with producers or associations, the Senate report simply stated (S. Rep. 474, *supra*, at 7):

> The bill does not prevent or require these actions and is not intended to do so. * * * [T]he proponents of the bill stated in their testimony that this was not the purpose * * *.
>
> * * * * *
>
> While the bill does not require a handler to deal with an association of producers, it certainly makes clear that farmers have a right to form such associations and should be protected in the exercise of this right. The fact is clear tha[t] an association of producers, which has obtained the voluntary membership of a large number of farmers[,] deserves respect and recognition by the handler of agricultural products.

If handlers can insist on dealing directly even with producers who have voluntarily appointed an association as their designated agent, it may be doubted whether the protections of the AFPA are in fact meaningful.

Moreover, the only portion of the federal Act clearly creating duties—and corresponding rights—is 7 U.S.C. 2303, which does nothing more than prohibit certain han-

dler practices. As the House report stated, "the scope of the bill embrace[s] only the prohibited acts in section 4" (H.R. Rep. 824, *supra*, at 5). See also 114 Cong. Rec. 7464 (1968) (remarks of Rep. Sisk) ("Certainly we want to avoid the interpretation that the legislation intends to encourage the circumvention of properly constituted marketing or bargaining associations.").[20]

In any event, this issue does not seem to present an independent ground for reversal of the Michigan Supreme Court's judgment. If nonmember producers may (consistently with the AFPA) be bound by the terms of contracts negotiated by an association, it is highly unlikely that the federal Act intended to grant handlers the right to insist that such terms be ignored. If, on the other hand, the AFPA permits any willing producer to remain aloof from an association and negotiate individually, the handlers' right invoked by appellants does not, as a practical matter, enlarge the class of suppliers with whom handlers may deal.

CONCLUSION

The judgment of the Michigan Supreme Court should be reversed.

Respectfully submitted.

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[20] It may be that a different question is presented in cases where a handler has a preexisting contract with a producer, and the contract contemplates direct dealings between the handler and producer. See *Butz* v. *Lawson Milk Co.*, 386 F. Supp. at 238-240. The AFPA need not be understood to require a handler in such a case to deal under the contract with an association that the producer has unilaterally appointed as his agent.